No. 91-777

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CENAC TOWING COMPANY, INC.,
Petitioner,

v.

SOUTH TEXAS TOWING COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a non-settling defendant in a maritime personal injury action remains liable to the plaintiffs for its proportionate share of fault when the plaintiffs have been paid a sum which is in excess of the jury's verdict by the settling defendant.

STATEMENT REQUIRED BY RULE 29.1

South Texas Towing Company, Inc., the respondent in these proceedings, is a corporation organized under the laws of the State of Texas. It has no parent and no subsidiaries.

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STATEMENT OF THE CASE

Garland L. Rollins, a seaman, was injured on April 28, 1987 in a collision between the towboats *Cullen Cenac* (owned by the petitioner, Cenac Towing Company) and *Tiffany J.* (owned by the respondent, South Texas Towing). He and his wife subsequently brought suit against both for damages.

Prior to trial, Mr. and Mrs. Rollins settled with Cenac for $250,000.00. The settlement agreement required Mr. and Mrs. Rollins to take their case against South Texas to trial, and to pay Cenac the first $50,000.00 of any recovery which they made. Pet. App. 26a-34a.

At trial, the jury awarded total damages of $183,000.00 and apportioned fault 70% to the petitioner, Cenac, and 30% to the respondent, South Texas. Pet. App. 13a-16a.

Thereafter, the District Court signed a Judgment in favor of Cenac, as the assignee of Mr. and Mrs. Rollins, for $50,000.00. Pet. App. 6a-7a.

South Texas appealed, and the Fifth Circuit reversed (*Rollins v. Cenac Towing Company, Inc.*, 938 F.2d 599 [5th Cir. 1991], *rehearing denied*, 945 F.2d 403 [5th Cir. 1991]), holding that because the Rollins received $250,000.00 from Cenac for a claim worth only $183,000.00, they were fully compensated by Cenac's payment. Pet. App. 1a-3a. Neither the plaintiffs nor Cenac, as assignee of Mr. and Mrs. Rollins, was therefore allowed to make a recovery from South Texas.

Prior to settlement, Cenac asserted a Cross-Claim for contribution against South Texas. South Texas moved to dismiss this Cross-Complaint on the morning of trial, following the settlement between Cenac and the Rollins family. This motion was granted by the district court. Pet. App. 17a-21a. Cenac did not appeal the dismissal of its Cross-Claim, and did not challenge that dismissal in the court of appeals. Pet. 12, footnote 11.

REASONS FOR DENYING THE WRIT

Cenac's application, perhaps inadvertently, confuses the rights which the plaintiffs (Mr. and Mrs. Rollins and Cenac, as their assignee) have against the defendant (South Texas) for *damages* with the rights which the co-defendants (Cenac and South Texas) have against each other for *contribution*.

The issue of *damages* is properly before the Court; the question of *contribution* is not. Petitioner lost the right to argue contribution when it failed to appeal from the district court's dismissal of its Cross-Claim on the morning of trial. Pet. App. 17a-21a.

The issue here is whether South Texas, the non-settling defendant, should be forced to make an additional payment to plaintiffs who have already been over-compensa-

ted through their settlement with Cenac, the settling defendant. The denial of Cenac's Cross-Complaint for contribution is not properly before this Court, and explicit or implicit references to the issue of contribution in the application should be disregarded.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Cenac argues (Pet. 5) that the decision of the Fifth Circuit merits review because ". . . it is in direct conflict with a decision of the Eighth Circuit holding a non-settling defendant liable for its proportionate degree of fault. *In the Matter of Associated Electric Cooperative*, 931 F.2d 1266 (8th Cir. 1991)."

This assertion is not correct. The decision below deals with a question of *damages* in an action between plaintiffs (Mr. and Mrs. Rollins and Cenac) and defendant (South Texas). *Associated Electric Cooperative*, on the other hand, deals squarely with a claim for *contribution* between two defendants.

Associated Electric Cooperative resulted from a maritime injury to Teddy Teasley, an AEC employee, who was hurt while adjusting cables on a barge owned by Mid-America Transportation Company ("MATCO"). AEC paid maintenance and cure to Teasley, but did not settle his claim for damages. When Teasley threatened suit, both AEC and MATCO instituted separate limitation of liability proceedings pursuant to 46 U.S.C.App. Sec. 185 (1988), and enjoined Teasley and his wife from filing an action of their own. "AEC then filed claims for maintenance and cure, contribution and indemnity in MATCO's limitation action, and requested similar relief in its own proceeding." 931 F.2d at 968.

In February, 1989, the Teasleys and MATCO made a separate settlement, through which MATCO agreed to pay the plaintiffs $50,000 *if* AEC's claims against MATCO were dismissed by the court. When this relief was granted,

AEC appealed, contending ". . . that the district court erred in (1) dismissing AEC's claims for indemnity and contribution against MATCO . . ." 931 F.2d at 968.

The Eighth Circuit affirmed, squarely holding that the non-settling defendant (AEC) had no right to claim indemnity or contribution from the settling defendant (MATCO). This decision is not at variance with the Opinion below, in which the Fifth Circuit has squarely held that ". . . South Texas gets full credit for the $250,000 settlement Cenac made with Rollins, wiping out any liability South Texas may have otherwise had for Rollins' injury which damaged him in the total amount of $183,000." 938 F.2d at 601. Cenac did not raise the question of contribution in the Fifth Circuit, and that issue was not considered in the court below.

To belabor the point, *Associated Electric Cooperative* deals with the ability of a non-settling defendant to obtain contribution or indemnity from a settling defendant, while this case determines the credit to which a non-settling defendant is entitled in a contest between the plaintiffs and that non-settling defendant, and says nothing of contribution.

The two issues are entirely separate. The first involves the liability (if any) of the non-settling defendant to the settling defendant, while the second concerns the relationship between the plaintiff and the non-settling defendant. This distinction is crucial, since maritime law gives rights to the plaintiff, in a contest with the defendants, which it does not necessarily give to the defendants, in a contest between themselves.

There is therefore no direct "conflict" between the decision in the Court below and the Eighth Circuit's Opinion in *Associated Electric Cooperative*, since these cases do not deal with the "same matter" within the meaning of Rule 10.1 (a) of the rules of this court.

II. THE DECISION BELOW DID NOT PRODUCE INCONGRUOUS RESULTS.

Cenac argues (Pet. 9) that ". . . the court of appeal has achieved . . . [an incongruous] result by insulating a wrongdoer from liability to an innocent plaintiff who was injured while eating lunch in the galley of respondent's tug." This curious agrument conveniently ignores the undisputed fact that our "innocent plaintiff[s]" have been paid $250,000.00 for a claim which the jury valued at $183,000.00. Mr. and Mrs. Rollins have not been cheated. They have, in consequence of Cenac's generosity, been over-compensated.

The "incongruity" which is the true subject of Cenac's unspoken complaint is the fact that South Texas, though 30% at fault, has been excused by the court of appeal from refunding part of Cenac's generous payment to the Rollins family. This, however, is not a question of *damages*; it is one of *contribution*. Such matters should not be considered by this court, since Cenac has not preserved the issue for appellate attention by appealing from the district court's dismissal of its Cross-Claim for contribution.

The fact is, there is nothing incongruous about the result which has been reached in this litigation. Cenac aggressively sought to obtain an advantage over its co-defendant, but because of a series of miscalculations has emerged as the empty-handed loser. Such are the harsh realities of personal injury litigation, and the pitfalls which much be endured by those who ply the trade. The story (from one perspective, at least) may be a sad one; it may produce results which are incongruous to some; but it does not justify the grant of *certiorari* to this applicant.

III. THE DECISION BELOW WAS NOT BASED UPON AN ERRONEOUS INTERPRETATION OF CONTROLLING JURISPRUDENCE.

Cenac contends (Pet. 5) that ". . . the decision below was based upon an erroneous interpretation of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979)." South Texas disagrees.

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir.1979) was the first maritime case to comprehensively regulate the rights of the parties to a partial settlement in a comparative fault setting. It held that, when the plaintiff and one defendant make a partial, pretrial settlement: (1) the plaintiff may keep what he receives from the settling defendant; (2) the non-settling defendant is credited with the proportion of fault which is attributed to the settling defendant; and (3) the non-settling defendant has no right to contribution from the settling defendant.

By way of example: assume that the plaintiff settles with defendant X for $10,000.00, then proceeds to trial against defendant Y. The jury awards $100,000.00 in damages, and apportions fault 25% to X, and 75% to Y. Under *Leger*, Y must pay 75% of $100,000.00, or $75,000.00 to the plaintiff, and has no right to compel contribution from X. The plaintiff keeps the $10,000.00 which he received from X, and the additional $75,000.00 which was paid by Y, for a total of $85,000.00. He loses the remaining $15,000 of his $100,000.00 jury award as a consequence of his bad settlement with X.

"According to the *Leger* rule, the plaintiff who settles with a defendant takes the burden and the benefit of his bargain." Thomas J. Schoenbaum, Admiralty and Maritime Law, sec. 4-15 (Supp. 1989).

In *Edmonds v. Compagnie Generale Transatlantique*, *supra*, this Court held that, when a longshoreman is injured as a result of his own contributory fault, the

negligence of his employer, and the negligence of the owner of the vessel on which he was working at the time of the accident, the shipowner can be compelled to pay the entirety of the longshoreman's damages, less the portion which is attributable to the plaintiff's own contributory negligence. "Congress," said Justice White, "did not intend to change the judicially created rule that the shipowner can be made to pay all the damages not due to the plaintiff's own negligence . . ." 443 U.S. at 271; 99 S.Ct. at 2762.

In *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied* 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), the Eleventh Circuit held that *Leger* does violence to the rule of *Edmonds*, since *Leger*, when applied to the facts of the *Self* case, excused the vessel owner from paying ". . . all the damages not due to the plaintiff's own negligence."

> ". . . the court reasoned that the plaintiff had the right to elect to sue one or all torfeasors and to recover all his damages from each. Therefore 'any inequity which results from the implementation of a seaman's damages award should be borne by the tortfeasors rather than the seaman himself' 832 F.2d at 1546.
>
> Thus the court held that a plaintiff in a personal injury or death case can recover his full damages from a non-settling tortfeasor less any amount paid to him by a settling defendant, regardless of either tortfeasor's percentage of fault. Self thus received his total damages less the amount received in the settlement with Chevron, $346,354 in lieu of the $198,406.20 awarded by the trial court."

Schoenbaum, *supra*, sec. 4-15 (Supp. 1989).

The rule of *Self* has since been adopted by the United States Court of Appeals for the Fifth Circuit in *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), *cert. denied* 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562

(1988), in *Myers v. Griffin Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990), and in the opinion below.

There can be no doubt that *Self* meets the requirement laid down by *Edmonds*: that of preventing maritime claimants from being short-changed by an imprudent partial settlement. The petitioner does not appear to contend that *Self* misinterprets *Edmonds* in this respect. "Here," Cenac complains (Pet. 9), "the court of appeal has achieved a contrary result by insulating a wrongdoer from liability to an innocent plaintiff. . . . Rather than serving to protect plaintiffs, as they were designed to do, *Self* and *Edmonds* have been used in this case to shield a culpable and solvent defendant."

This argument makes it apparent, yet again, that Cenac's true concern is *not* the plaintiff's recovery of *damages*. That has already been assured by the petitioner's $250,000.00 pre-trial payment to Mr. and Mrs. Rollins. Cenac's actual difficulty is its inability to compel *contribution* from South Texas. That issue, however, is not before this court, because of the petitioner's failure to take an appeal from the district court's dismissal of its Cross-Claim for contribution against South Texas. The applicant's entitlement to contribution cannot, after all, be decided in an action where Cenac has not properly preserved its right to seek such relief.

The opinion below fully complies with the *Edmonds* requirement that plaintiffs be paid the full damages to which they are entitled. Neither this case nor *Self* is based upon an erroneous interpretation of the *Edmonds* decision. Cenac's representations to the contrary constitute a disingenuous attempt to circumvent the procedural shortcomings of its position. They should be rejected for that reason.

CONCLUSION

Cenac contends that the effect of partial settlements in maritime cases is no longer certain, and argues that the proportionate fault rule is the best method for clearing the air of confusion. South Texas challenges both claims. *Self* is undoubtedly the law in at least two of the federal circuits, and has proven to be a simple, reliable, equitable method of resolving the conflicts which result from complex partial settlements of the sort which are at issue here. For that reason alone, *certiorari* is not appropriate in this litigation.

Even if this were not true, even if the shortcomings which the petitioner finds in *Self* were indisputably present, this is not the case in which to rectify any problems which may exist in the present law. For in arguing that the bread has been sliced unevenly, Cenac has left the sharp knife of contribution in the district court. The applicant argues that equity should be done, by forcing South Texas to pay its proportionate share of damages, but has neglected, through a failure of advocacy, to provide this court, in this case, with the tools with which to apportion the loaf in an evenhanded fashion.

Self is working well, and should not be tinkered with; in any event, this is not the case in which to undertake the work. For both reasons, the Petition for *certiorari* is not well founded, and should be denied by the court.

Respectfully submitted,

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